Some of the Law Lords take occasion to approve, also, the doctrine of *British Mut. Banking Co.* v. *Charnwood, etc., Co.*, 18 Q. B. D. 714, in which it is decided that a principal is not liable for the misrepresentations of his agent unless such misrepresentations were made for the benefit of the principal. This doctrine has been generally accepted as the English law, and disapproval of it was hardly to be expected. Yet it is believed that it is unsound, for, as already suggested, the nature of the act should alone be regarded in determining whether it was done in the course of employment. A servant about his master's business acts for his own benefit and not for the benefit of his master when he engages in a conversation with a friend, or indulges in a nap; yet if injury results to a third party from his inattention to duty, the master would be liable to respond in damages. There seems to be no reason for applying a different rule when the tort which the servant commits is wilful rather than negligent. The American courts, in determining a principal's liability, do not inquire whether the agent was acting for his principal's benefit either in cases of intentional or unintentional tort.

RECENT CASES.

AGENCY — WILFUL MISREPRESENTATIONS BY AGENT — PRINCIPAL'S LIABILITY TO THIRD PERSONS. — The secretary of a company, to accommodate a friend, certified a transfer of shares, though the certificates were not lodged in the company's office as represented. *Held*, that the company is not liable to the transferee for the misrepresentation of its secretary. *George Whitechurch, Ltd.* v. *Cavanagh*, [1902] A. C. 117. See NOTES, p. 61.

BANKRUPTCY — DEBTS NOT DISCHARGEABLE — JUDGMENT FOR LIBEL. — *Held*, that libel is a "wilful and malicious injury to the person" within the meaning of c. 3, § 17 of the Bankruptcy Act of 1898, and therefore that proceedings under the Act do not discharge a judgment obtained in an action for libel. *McDonald* v. *Brown*, 51 Atl. Rep. 213 (R. I.).

Proof of actual malice is not necessary to maintain an action for libel. *Ullrich* v. *N. Y. Press Co.* (Sup. Ct., Tr. T.), 23 Misc. (N. Y.) 168; ODGERS, LIBEL AND SLANDER, 2d ed. 269. It is, however, generally held that so-called malice in law, or absence of legal excuse, is an essential element. *Bromage* v. *Prosser*, 4 B. & C. 247; *Barr* v. *Moore*, 87 Pa. St. 385. The court in the principal case applied to the word "malicious" in the Act this fictitious meaning. But, since the section in question in effect imposes a penalty, it would seem more reasonable to hold that Congress intended to use the word in its natural sense, requiring a bad *animus* to be shown. This seems to be the first case of a judgment for libel arising under this section. The only other cases to be found in which this clause was interpreted are those of judgments for seduction and criminal conversation. The court's construction of "malicious" finds support in these cases. *In re Maples*, 105 Fed. Rep. 919; *Colwell* v. *Tinker*, 169 N. Y. 531. As there may be a negligent publication, the decision, in holding that a libel is necessarily wilful, seems further open to criticism. See *Vitz Etelly* v. *Mundie's Select Library*, Ltd., [1900] 2 Q. B. 170. Libel was properly regarded as an "injury to the person" within the meaning of the Act. See *In re Freche*, 109 Fed. Rep. 620; *Colwell* v. *Tinker*, *supra*.

BANKRUPTCY — PETITION BY COMMITTEE OF A LUNATIC. — A petition in bankruptcy was filed by the committee of a lunatic. *Held*, that the court had no jurisdiction to entertain such a petition. *In the matter of Eisenberg*, 27 N. Y. L. J. 1909 (Sept. 29, 1902). See Notes, p. 56.

CONFLICT OF LAWS — INTERPRETATION OF WILL OF PERSONALTY — LAW OF TESTATOR'S DOMICILE. — A testator domiciled in England bequeathed money to the next of kin of A, domiciled in Germany. The next of kin according to the German law was A's niece, according to the English law his step-sister. *Held*, that the will must be interpreted according to English law. *In re Fergusson's Will*, [1902] 1 Ch. 483 (Eng.).

A will of personalty is in general to be interpreted according to the law of the testator's domicile at the time of his death. See DICEY, CONF. OF LAWS, 695. Consequently technical legal terms such as "next of kin" are given the meaning attached to them in the law of that jurisdiction. *Knights Templars, etc., Ass'n* v. *Greene*, 79 Fed. Rep. 460; *cf. Staigg* v. *Atkinson*, 144 Mass. 564. The application of this rule to the principal case leads to the curious result that the members of a German family domiciled in Germany are determined according to English law. The rule is generally said to be based on the presumption that the testator was familiar with the technical meaning of the language in his domicile, and intended that meaning to be applied to it. This is obviously fictitious. The rule, however, is well established, and, perhaps, works no hardship in the general case. It has the merit of simplifying interpretation; but when, as in the principal case, the language may well have either one of two meanings, the rule becomes arbitrary, and may often defeat the testator's intention.

CONFLICT OF LAWS — JURISDICTION — RIGHT ACQUIRED UNDER FOREIGN STATUTE. — Under the Mexican statute giving an action for death by wrongful act, the liability of the defendant is limited to furnishing support to the legal dependents of the deceased during the periods of time that support would have been due from him, payments being made in monthly instalments. Action was brought under this statute by the proper parties, in the United States Circuit Court. *Held*, that the court should decline jurisdiction. *Mexican, etc., R. R. Co.* v. *Slater*, 115 Fed. Rep. 593 (C. C. A., Eighth Circ.).

On principle it should be immaterial whether foreign-acquired rights arise under statutes or at common law. See *Dennick* v. *Central R. R., etc.*, 103 U. S. 11. In practice, however, a distinction is sometimes made. All courts seem to agree in refusing to enforce penal obligations, or claims whose enforcement would violate public policy. *O'Reilly* v. *N. Y., etc., R. R.*, 16 R. I. 388; *The Kensington*, 183 U. S. 263. It ought equally to be recognized as immaterial whether there would have been any cause of action under the local law, since it is the foreign law that determines the right in question. Such is the general rule as to common law rights. *Greenwood* v. *Curtis*, 6 Mass. 358. Where, however, the right accrued under a foreign statute, some courts make the existence of a similar local statute essential to give jurisdiction. *St. Louis, etc., Ry.* v. *McCormick*, 71 Tex. 660; *Anderson* v. *Milwaukee, etc., Ry. Co.*, 37 Wis. 321; *The Halley*, L. R. 2 P. C. 193. But the existence of such a statute seems more properly held unnecessary. *Herrick* v. *Minneapolis, etc., Ry. Co.*, 31 Minn. 11. Moreover dissimilarity should be immaterial unless so great as to conflict with public policy. See *Evey* v. *Mexican, etc., Ry. Co.*, 81 Fed. Rep. 294. A foreign statute may, however, give a right of so peculiar a character that the court cannot, under its procedure, do substantial justice between the parties. It may then properly decline jurisdiction. See *Higgins* v. *Central, etc., Ry. Co.*, 155 Mass. 176. On this ground the principal case may be rested.

CONFLICT OF LAWS — TAXATION OF NON-RESIDENT'S CHOSES IN ACTION. — A New Jersey corporation had a permanent place of business in Georgia, where it sold goods regularly for cash and on short credit, through an agent. The money collected was remitted from time to time to a New York office. *Held*, that the cash on hand and solvent accounts are taxable by the city in which the branch is located as the property of a non-resident. *Armour Packing Co.* v. *Mayor, etc., of Savannah*, 41 S. E. Rep. 237 (Ga.).

Personal property of a non-resident is liable to taxation where located, even though taxed also at the owner's domicile. *Coe* v. *Errol*, 116 U. S. 517. Obviously, therefore, the money collected was properly taxed; and the credits are within the same rule if it can be said that they exist within the city. There are various views as to the situs of a chose in action. For example, the courts declare that it is at the owner's domicile, that it follows the debtor, and that a chose in action has no situs. *Louisville & N. Ry. Co.* v. *Nash*, 118 Ala. 477; *Chicago, etc., Ry. Co.* v. *Sturm*, 174 U. S. 710; Peckham, J., in *Guillander* v. *Howell*, 35 N. Y. 657, 661. It is hardly too much to say that the policy and convenience in each class of cases determine whether a chose in action shall be considered for the purposes involved, as existing in a particular place. For purposes of taxation a credit is very generally regarded as property at the place where it is held, and claims of a non-resident creditor, in an agent's hands, are taxable at the agent's domicile. *People* v. *Trustees of Ogdensburg*, 48 N. Y. 390, 397; *Catlin* v. *Hull*, 21 Vt. 152; *People* v. *Barker*, 23 N. Y. App. Div. 524; *contra, City of Vicksburg* v. *Armour Packing Co.*, 24 S. W. Rep. 224 (Miss.). Consequently the credits also were properly taxed.

CONFLICT OF LAWS — VALIDITY OF CONTRACTS — LAW OF THE INTENTION OF PARTIES. — The plaintiff, living in the Island of Jersey, insured a stamp collection

with the Sun Fire Office through its agent in Jersey, the policy containing an arbitration clause referring to the English Arbitration Act. A loss having occurred and arbitration failing, the plaintiff brought suit against the agent in Jersey. *Held*, that giving effect to the intention of the parties, the contract was to be governed by the law of England. *Spurrier* v. *La Cloche*, [1902] A. C. 446 (Eng., P. C.). See NOTES, p. 58.

CONSTITUTIONAL LAW — RESTRICTIONS ON FREEDOM OF THE PRESS. — The defendant published an article advocating wholesale murder of all officers of the government. He was convicted under section 675 of the New York Code, providing that "a person who wilfully and wrongfully commits any act which seriously . . . endangers the public peace . . . is guilty of a misdemeanor." *Held*, that conviction under this provision does not infringe the constitutional right of freedom of the press. *People* v. *Most*, 171 N. Y. 423. See NOTES, p. 55.

CONSTITUTIONAL LAW — SPECIAL LEGISLATION — CLASSIFICATION OF CITIES. — A municipal board of control held office under a statute applying only to "cities of the second grade of the first class." Only one city was included in the class. *Held*, that since "the body of legislation relating to this subject shows the legislative intent to substitute isolation for classification," the law is special and invalid. *State* v. *Beacom*, 64 N. E. Rep. 427 (Oh.). See NOTES, p. 59.

CONTRACTS — IMPOSSIBILITY AS AN EXCUSE — CHANGE OF FOREIGN LAW. — The defendant contracted at New York to furnish laborers for transportation from Barbadoes. A subsequent colonial ordinance forbade further embarkation of such laborers. *Held*, that this was no excuse for non-performance of the contract. *Tweedie Trading Co.* v. *McDonald Co*, 114 Fed. Rep. 985 (Dist. Ct., S. D., New York).

A change of domestic law is universally held to be an excuse for the non-performance of a contract. *Baily* v. *De Crèspigny*, L. R. 4 Q. B. D. 180; *Exposito* v. *Bowden*, 7 E. & B. 763; *Cordes* v. *Miller*, 39 Mich. 581. This rule is necessary to avoid the manifest injustice of forcing a defendant to pay damages for not doing an illegal act. The law ought not at the same time to enforce and forbid. The same necessity does not exist, however, when the performance has become contrary to foreign law; for a foreign law is a fact, beyond the control of the state, which may render the contract impossible but not illegal. Accordingly the English Courts have consistently held that impossibility resulting from the intervention of foreign law does not excuse. *Blight* v. *Page*, 3 Bos. & Pull. 295, note; *Barker* v. *Hodgson*, 3 M. & S. 267; *Jacobs* v. *Crédit Lyonnais*, 12 Q. B. D. 589. This case is apparently the first in this country in which the point was involved, and, in following the English rule, it would seem to oppose the present commendable tendency of some American courts to extend the scope of impossibility, as an excuse. See *Lovering* v. *Buck Mountain Co.*, 54 Pa. St. 291; *Buffalo, etc., Co.* v. *Bellevue, etc., Co.*, 165 N. Y. 247. See 15 HARV. L. REV. 63, 418.

CONTRACTS — REPUDIATION AS A DEFENCE IN AN ACTION FOR PAYMENTS ALREADY DUE. — A contractor agreed with the city of B. to erect a building for a lump sum, payments to be made monthly for seventy per cent of the work done. With the consent of the city the contractor assigned his rights to the plaintiff, at whose request the city held back the monthly instalments. After three payments had become due the contractor repudiated the contract and his surety carried it out. In a suit by the surety against the city, the plaintiff intervened. *Held*, that the city has a right to declare the deferred payments forfeited and that the surety is subrogated to that right. *First Nat. Bank* v. *City Trust, etc., Co.*, 114 Fed. Rep. 529 (C. C. A., Ninth Circ.).

In an action of contract the defence of non-performance by the plaintiff is now conceived to be an equitable defence, analogous to failure of consideration. See 14 HARV. L. REV. 424, 543. The city's obligation seems to have been indivisible; but, for the convenience of the contractor, monthly payments in advance had been agreed upon. As each payment fell due, the plaintiff as assignee might be regarded as acquiring a vested right to it, of which no subsequent breach could deprive him. See *Jackson* v. *Cleveland*, 15 Wis. 107. The right of the city would then be a counter claim or a direct action against the contractor. Since, however, each part payment is not for work already done, but is rather an advance, the mere fact that the contractor's default occurs after several instalments have become due, should not deprive the city of its equitable defence. As the surety is subrogated to all the city's rights, the decision seems correct, assuming that the city had not received substantial performance.

CONTRACTS — REPUDIATION BY MAIL — WHERE ACTION ACCRUES. — The defendant had hired the plaintiff for a definite term as his London correspondent. Before the end of the term the defendant wrote the plaintiff from Naples terminating his employment. This letter the plaintiff received in London. In order to obtain service upon the defendant abroad it was necessary for the plaintiff to bring himself within

the statute by proving, *inter alia*, that the breach of the contract occurred in England. *Held*, that there was a complete breach of the contract where the letter was posted abroad. *Holland* v. *Bennett*, [1902] 1 K. B. 867 (Eng.).

This result is supported by English authority. *Cherry* v. *Thompson*, L. R. 7 Q. B. 573; *Matthews* v. *Alexander*, Ir. Rep. 7 C. L. 575; *Hamilton* v. *Barr*, 18 L. R. Ir. 297. The American decisions most closely analogous seem to point to the opposite conclusion. It is held that an employee is entitled to his wages until he has received notice of his discharge. *North Chgo., etc., Co.* v. *Hyland*, 94 Ind. 448. Only after receipt of the letter can an offer be acted upon. *Tinn* v. *Hoffman & Co.*, 29 L. T. Rep. N S. 271, 277. The same is true of the retraction of an offer. *Henthorn* v. *Fraser*, [1892] 2 Ch. D. 27. It also holds in the case of the revocation of an agent's authority. *Robertson* v. *Cloud*, 47 Miss. 208; *Sayre* v. *Wilson*, 86 Ala. 151. True, it is generally law that the mailing of the acceptance completes the contract. *Dunlop* v. *Higgins*, 1 H. L. Cas. 381; *Tayloe* v. *Merchants Fire Ins. Co.*, 18 Curtis (U. S. Sup. Ct.) 191. But this is an exception to the general rule that only the communicated intention is effectual; and it does not seem so closely analogous to the principal case as do the instances of revocation of an agent's authority, or of an offer. It would consequently seem to follow that the breach of contract was committed at the time and place of delivery of the letter, and that the plaintiff was entitled to the service desired.

CORPORATIONS — COLLATERAL ATTACK OF STATUS IN EMINENT DOMAIN PROCEEDINGS. — In eminent domain proceedings to condemn a right of way, the defendant alleged that the plaintiff was not a corporation *de jure*. *Held*, that the question whether the plaintiff is a corporation *de jure* or *de facto* cannot be raised in these proceedings. *Postal, etc., Co.* v. *Oregon, etc., R. R. Co.*, 114 Fed. Rep. 787 (Circ. Ct., Mont.).

Ordinarily only the sovereign in a direct suit can inquire whether a corporation has strictly complied with the statutory requirements of organization, and thus become a corporation *de jure*. See THOMPSON, CORP., § 1850. But when it is sought to enforce the right of eminent domain, the defence that the plaintiff is but a *de facto* corporation has sometimes been allowed a private person. *Orrick School District* v. *Dorton*, 125 Mo. 439; see *N. Y. Cable Co.* v. *Mayor, etc., of N. Y.* 1, 43. The justification for this exception to the usual rule is to be found in the nature of the extraordinary right of eminent domain. It would seem reasonable that a corporation, in order to take advantage of this delegated prerogative of the sovereign, should be required to be a *de jure* corporation, assured of permanency; and not merely *de facto* and liable at any time to dissolution by *quo warranto* proceedings. See 2 MORAWETZ, CORP., § 768. This view, however, seems not to have been widely considered by the courts; and it must be admitted that the holding in the principal case accords with the weight of authority. *National Docks Ry. Co.* v. *Central R. R. Co.*, 32 N. J. Eq. 755; *Brown* v. *Calumet, etc., Ry. Co.*, 125 Ill. 600.

CORPORATIONS — MORTGAGE OF FRANCHISES — EFFECT OF STATUTE UPON RIGHTS OF PURCHASER AT FORECLOSURE SALE. — The statutes of New York, 1892, c. 688, §§ 2, 3, allow corporations to mortgage their property and franchises, and authorize purchasers at a foreclosure sale to form a corporation which shall enjoy all the rights, privileges, and franchises which at the time of the sale belonged to the mortgagors. The defendant was duly organized under these provisions. During the life of the old company and prior to the foreclosure, the legislature passed an act compelling railroads to issue mileage books upon specified terms. *Held*, that the defendant is bound by this statute. *Minor* v. *Erie R. R. Co.*, 171 N. Y. 566.

The statute in question could not be enforced against corporations existing before its passage, because of the Fourteenth Amendment. *Lake Shore, etc., Ry.* v. *Smith*, 173 U. S. 684. To bring itself within the scope of this decision the defendant must show that it continues the corporate existence of its predecessor. But the right to be a corporation is generally held not to be included in the term "franchises," and, therefore, not to be transferable by sale or mortgage. *State* v. *Sherman*, 22 Oh. St. 411; and see *Commonwealth* v. *Smith*, 10 Allen (Mass.) 448; but *cf. St. Paul, etc., R. R. Co.* v. *Parcher*, 14 Minn. 297. The statute cannot, in the second place, be resisted on the ground that the constitutional immunity was, by fair implication, reserved to the new company by the statute under which it incorporated. Those terms reasonably implied only the rights, privileges, and franchises received at the hands of the state; and it appears to be a settled rule that courts shall construe statutes most favorably to the state. See *Coosaw Mining Co.* v. *South Carolina*, 144 U. S. 550, 561. Finally, the act in question is not void as impairing a contract right of the defendant to receive the franchises which it purchased, undiminished in value, since upon authority no such contract was created. *Schurz* v. *Cook*, 148 U. S. 397. The decision in the principal case seems, therefore, unassailable.

CORPORATIONS — OBLIGATION OF BANK DIRECTOR TO WARN DEPOSITOR OF INSOLVENCY. — A bank director, after he had discovered the insolvency of the bank, permitted deposits to be received, without attempting to have the bank closed, or to warn depositors. There was some evidence that he had actually directed the cashier to receive deposits. *Held*, that he was liable to subsequent depositors for fraud, in that, by his failure to act, he had held out the bank as solvent. *Cassidy* v. *Uhlman*, 63 N. E. Rep. 554 (N. Y.).

One may be liable for fraud on the ground of mere nonfeasance, but only where he owed to the party defrauded some positive duty to act. *Loewer* v. *Harris*, 57 Fed. Rep. 368. It is difficult to see how a director, by an undertaking between himself and the stockholders to perform the duties of his office, thereby incurs liability to third parties for failure to perform such duties. Accordingly, it has been held that he owes to creditors no duty to use due care in the conduct of the business. *Jackson* v. *Munster Bank*, Ir. L. R. 15 Eq. 356. He is, of course, liable to stockholders for negligence on account of his fiduciary relation. *Union Nat. Bank* v. *Hill*, 148 Mo. 380. It would seem, then, that defendant's failure to act in this case was not a breach of any duty to the depositors, and consequently no fraud upon them. So far as the decision is based on evidence of a positive act of direction, however, it seems sound. *Humphling* v. *Burr*, 59 Mich. 294.

CORPORATIONS — RECEIVER FOR RAILROAD — CERTIFICATES GIVEN PRIORITY TO MORTGAGES. — A court of equity authorized its receiver to issue, for the completion of a railroad, certificates with priority of lien, without giving the bondholders an opportunity to be heard. *Held*, that the court has exceeded its power. *Bibber-White Co.* v. *White, etc., Co. et al.*, 115 Fed. Rep. 786 (C. C. A., Second Circ.). See NOTES, p. 53.

DAMAGES — MENTAL DISTRESS AS AN ELEMENT OF DAMAGES — DELAY IN SHIPMENT OF CORPSE. — The defendant, a common carrier, negligently delayed the shipment of a corpse which it had received from the plaintiff and knew to be that of his wife. The resulting anxiety and necessity of postponing the funeral caused the plaintiff great mental distress, but did him no physical injury. *Held*, that the plaintiff was entitled to recover for his mental distress as an element of damages. *Louisville & N. R. R. Co.* v. *Hull*, 68 S. W. Rep. 433 (Ky.).

This case seems a logical application to carriers of the doctrine of the telegraph cases. *Chapman* v. *Western Union Tel. Co.*, 90 Ky. 265. In actions for breach of contract of marriage, also, mental distress has very generally been allowed as an element of damage. *Tobin* v. *Shaw*, 45 Me. 331. In such cases the probability of great mental distress resulting from breach of the contract is no stronger than in the principal case, while all the practical objections apply as well to the former as to the latter. Unlike the ordinary marriage contract case, the wrong here was negligent only; yet damages are often allowed for mental suffering occasioned by negligence, as when concurrent with physical injury, or in actions for libel or slander negligently published. *Carpenter* v. *Mexican Nat. R. R. Co.*, 39 Fed. Rep 315; *Morrison* v. *Ritchie & Co.*, 39 Scot. L Rep. 432; 112 L. T. 472. But notice to defendant that his negligence would probably cause mental distress is essential to the plaintiff's right of action. *Nichols* v. *Eddy*, 24 S. W. Rep. 316 (Tex). The case accords with what little authority has been found. *Hale* v. *Bonner*, 82 Tex. 33; *Wells, Fargo & Co.'s Express* v. *Fuller*, 35 S. W. Rep. 824 (Tex.). It would follow from a contrary holding that only nominal damages could be recovered for the loss of a corpse, since there is no property in a dead body. 2 BL. COM. 429; *Williams* v. *Williams*, 20 Ch. D. 659.

EQUITY — INJUNCTION AGAINST BREACH OF CONTRACT — MUTUALITY. — The defendant contracted to render personal service as a ball player exclusively to the plaintiff, who was to have the right to renew the contract during the three following seasons and to terminate the whole engagement upon ten days' notice. The plaintiff brought a bill to restrain the defendant from rendering service to others in breach of his contract. *Held*, that the contract is not lacking in mutuality and that the threatened breach will be enjoined. *Phila. Ball Club* v. *Lajoie*, 51 Atl. Rep. 973 (Pa.); *contra, Brooklyn, etc., Club* v. *McGuire*, 116 Fed. Rep. 782. See BOOKS AND PERIODICALS, p. 72.

EQUITY — PURCHASE FOR VALUE WITHOUT NOTICE — ASSIGNMENT OF JUDGMENT THROUGH FRAUD. — The plaintiff was induced by fraud to assign a judgment to B, who thereupon sold it to the defendant, as purchaser for value without notice. A bill was filed to have the assignment set aside. *Held*, that the defendant took subject to all the equities existing against his assignor. *Luecht* v. *Pearson*, 101 Ill. App. 236.

It is usually thought that the authorities are in hopeless conflict on this question. In England there is some confusion. See *Ashwin* v. *Burton*, 32 L. J. Ch. 196; *cf. Cockell* v. *Taylor*, 15 Beav. 103. But in America the weight of authority seems strongly

with the purchaser. *Williams* v. *Donnelly*, 74 N. W. Rep. 601, 605 (Neb.). *Starr* v. *Haskins*, 26 N. J. Eq. 414. Even in jurisdictions which repudiate the general principle that an innocent purchaser of a non-negotiable chose in action takes free from latent equities, the same result is reached on the ground that the assignor is estopped. *Moore* v. *Moore*, 112 Ind. 149; *Moore* v. *Metropolitan Bank*, 55 N. Y. 41. The contrary decisions seem to confuse equitable defences of an obligor with equities of persons other than an obligor. See *Cutts* v. *Guild*, 57 N. Y. 229. Against the obligor, to be sure, an assignee stands in the shoes of his assignor. But since he gets a legal right by his assignment, against equities of third parties he should be protected. 1 HARV. L. REV. 7. The principal case therefore seems unsound. It was decided on New York authority: *Bush* v. *Lathrop*, 22 N. Y. 535; *Cutts* v. *Guild*, 57 N. Y. 227. But the court seems not to have noted the previous decisions the other way in its own jurisdiction; nor that the New York cases relied on have been much modified if not overruled. *Silverman* v. *Bullock*, 98 Ill. 11; *Himrod* v. *Gilman*, 147 Ill. 293; *Humble* v. *Curtis*, 160 Ill. 193; *Merchants Bank* v. *Weill*, 163 N. Y. 486. The decision is moreover to be regretted from the standpoint of business convenience.

EQUITY — RIGHT TO PRIVACY. — INJUNCTION — A flour company published lithograph portraits of a young woman as a trade advertisement without her consent. The plaintiff asked for an injunction and for damages. *Held*, that she has no cause of action. *Roberson* v. *Rochester, etc., Co.*, 171 N. Y. 538. See BOOKS AND PERIODICALS, p. 72.

EQUITY — TRADE LIBEL — RESTRAINING PUBLICATION BY INJUNCTION. — The defendant, editor of a magazine, published fictitious letters containing false statements derogatory to the plaintiff's goods. *Held*, that a bill for an injunction stating the above facts is demurrable. *Marlin Fire Arms Co.* v. *Shields*, 171 N. Y. 384. For a discussion of this case after the contrary decision of the Supreme Court, see 15 HARV. L. REV. 734.

INSURANCE. — BENEFIT SOCIETIES — EFFECT OF CONTRACT TO NAME AS BENEFICIARY. — A member of a benefit society took out a certificate naming his sister as beneficiary. Later, by an ante-nuptial contract, he agreed to substitute his intended wife as beneficiary; but he died before fulfilling the agreement. The association filed a bill of interpleader against the sister and the widow. *Held*, that the widow is entitled to the proceeds of the insurance. *Pennsylvania, etc., Co.* v. *Wolfe*, 52 Atl. Rep. 247 (Pa.).

In general, no change of beneficiary under such a policy is effectual unless the rules of the society are strictly complied with. *Holland* v. *Taylor*, 111 Ind. 121. In three well-defined classes of cases, however, where the insured has attempted to procure a change, but without fully complying with the rules, the courts sustain the change. *Manning* v. *Ancient Order, etc.*, 86 Ky. 136; *Grand Lodge, etc.*, v. *Child*, 70 Mich. 163; *Hirschl* v. *Clark*, 81 Ia. 200. The present case goes further in giving effect to a change merely contracted for. The decision, however, though novel, seems sound. Contrary to the usual rule as to life insurance policies, a change of beneficiary in policies of benefit societies can be made without the consent of the person already named. *Masonic, etc., Society* v. *Burkhart*, 110 Ind. 189. The sister, therefore, before the death of the insured, had no vested interest of which the agreement to substitute the wife as beneficiary could defraud her. See *Hoeft* v. *Supreme Lodge, etc.*, 113 Cal. 91. Being, moreover, a mere volunteer, she has no standing in equity as against one who has given value. Support is given to the decision by the cases found most nearly in point. *Leaf* v. *Leaf*, 92 Ky. 166; see also *Jory* v. *Supreme Council, etc.*, 105 Cal. 20. It is further supported by the closely analogous cases of unfulfilled agreements to give legacies. See *Riley* v. *Allen*, 54 N. J. Eq. 495.

INSURANCE — VALUED POLICY ON SHIP — INSURER'S LIABILITY FOR GENERAL AVERAGE AND SALVAGE CHARGES. — The vessel was valued at £33,000, and was insured for that amount. She incurred general average and salvage charges of £530, which were assessed on a valuation of £40,000. *Held*, that the insurers are liable for only thirty-three fortieths of the charges. *S. S. Balmoral Co.* v. *Martin*, 18 T. L. R. 802 (Eng. H. L.).

Authority on the question is meagre. The case is supported by an early Massachusetts decision, but the New York and Federal Courts hold the insurer liable for the entire charges. *Clark* v. *United Fire, etc., Co.*, 7 Mass. 365; *Providence, etc., Co.* v. *Phœnix Ins. Co.*, 89 N. Y. 559; *Internat. Navig. Co.* v. *Atlantic, etc., Co.*, 100 Fed. Rep. 304. Cases of particular average on cargo are to be distinguished. The reason for using in those cases a formula similar to that employed here, is that the value of the cargo is subject to great fluctuations, and the owner is not insuring his profits, but merely securing himself against actual loss. See *Lewis* v. *Rucker*, 2 Burr. (Eng.) 1167. The

value of the ship, on the other hand, is practically constant, so that the reason for applying this formula disappears in such a case. See 2 ARNOLD, MARINE INS., § 1023. The court rests the decision on the ground that an owner who undervalues his ship is to be treated as an insurer for the excess of the actual worth over the policy value. But the rule of the New York and Federal Courts seems better adapted to the purpose of insurance, which is to protect the owner against all loss, up to the amount of his policy.

INTERNATIONAL LAW — GOVERNMENT CONTRACT — MINISTER AS PLAINTIFF. — A shipbuilding firm contracted with A, B, C, D representing X, Minister of Marine of Spain. The ships contracted for were not delivered in time; and E, F, G, H, representing J, now Minister of Marine, sue. *Held*, that the suit is well brought. *Castaneda* v. *Clydebank Engineering, etc., Co., Ltd.*, 18 T. L. R. 773 (Eng., H. L.). See NOTES, p. 60.

MANDAMUS — DIRECTED AGAINST EXECUTIVE — MINISTERIAL ACTS. — The governor of the State refused to fill a vacancy in the office of lieutenant-governor, by appointment, as directed by statute. *Held*, that mandamus will lie to compel an appointment. *State ex rel.* v. *Nash, Governor*, 64 N. E. Rep. 558 (Ohio).

A small majority of State courts wholly refuse to issue a mandamus against the governor, for the reason that executive functions should be free from judicial control. *People ex rel.* v. *Governor*, 29 Mich. 320. Some duties of the governor, however, in which no discretion is involved and the method of performance is fully prescribed by law, are wholly ministerial, and accordingly many courts will issue a mandamus in such cases. *Martin, Governor*, v. *Ingham*, 38 Kan. 641. See *Marbury* v. *Madison*, 1 Cranch (U. S. Sup. Ct.), 137. While this doctrine seems sound, it obviously should be applied with caution. The court in the principal case sought to conform its action to this doctrine, by leaving the selection of an appointee to the unrestrained discretion of the governor, and decreeing merely that some appointment be made. Such a splitting up of a single duty, however, compelling the governor to use his discretion, and yet attempting to leave that discretion perfectly free, goes beyond the reason and authority of previous cases, and is too subtle to be safely followed.

MUNICIPAL CORPORATION — GRANT OF LIGHTING FRANCHISE — COMPETITION BY CITY. — A state statute authorized cities to erect electric lighting plants, with a proviso that the right might be delegated. The plaintiff company was chartered by a city to erect and maintain such a plant for twenty years. Before the expiration of this time the city council voted to erect a municipal plant, to be maintained in competition with plaintiff. *Held*, that this is an act under state authority, impairing the obligation of a contract. *Southwest Mo. Light Co.* v. *City of Joplin*, 113 Fed. Rep. 817 (Circ. Ct., W. D. Mo.).

The court argues that in a grant of a franchise to operate in a certain field, there is implied a promise not to impair the value of that field by competition. But it is a well-recognized rule that public grants are construed strictly against the grantee. *Appeal of Scranton Electric, etc., Co.*, 122 Pa. St. 154. An intention to grant an exclusive privilege will not be attributed to the governing body, except upon clear evidence. See *Jersey City, etc., Co.* v. *Consumers' Gas Co.*, 40 N. J. Eq. 427. In the case relied upon by the court as authority for its decision, there was an express provision in the contract, that the city should not build during the term of the grant. *Walla Walla Water Co.* v. *City of Walla Walla*, 60 Fed. Rep. 957. Where there is no such provision, the grant has usually been construed as not exclusive. *Hamilton, etc., Co.* v. *City of Hamilton*, 146 U. S. 258. It would seem, therefore, that this grant should include merely a right to supply such customers as the company can attract by superior service.

MUNICIPAL CORPORATION — NEGLIGENCE IN MAINTAINING DRAINS — INJURY TO HEALTH AND PROPERTY. — A drainage ditch constructed by a municipal corporation became through negligence so obstructed that it repeatedly overflowed the plaintiff's adjoining premises, and caused damage to his property and illness in his family. *Held*, that the plaintiff could recover for injury to his property, but not for damage on account of the illness of himself or family. *Williams* v. *Town of Greenville*, 130 N. C. 93.

It is well settled that a municipal corporation is not liable for damages caused by acts performed in its governmental capacity as distinguished from its corporate or ministerial capacity. *Fire Ins. Co.* v. *Village of Keeseville*, 148 N. Y. 46. The court considered the care of a drain an act done in governmental capacity, but nevertheless allowed recovery for injury to the property, regarding it as within the constitutional prohibition against taking property without compensation. The care of a drain,

however, is, by the better view, a ministerial duty, and the city's liability is based on the failure to perform it properly. *Bates* v. *Westborough*, 151 Mass. 174, 183; *Hession* v. *Mayor, etc., of Wilmington*, 1 Marvel (Del.) 122. The distinction made by the court in the principal case between injury to property and injury to health seems not well taken. True, it has been held that one cannot recover for an injury to health when the injured person suffers only as a member of the public. *Hughes* v. *City of Auburn*, 161 N. Y. 96. But when, as in the principal case, the plaintiff can show a trespass as a basis for his action, he can recover also consequential damages caused by injury to health. *Allen* v. *City of Boston*, 159 Mass. 324.

PLEADING — DEMURRER TO BILL IN EQUITY — ADMISSION OF TRUTH OF FACTS WELL PLEADED. — The State of Kansas filed a bill in equity to restrain the State of Colorado from diverting the waters of the Arkansas River to the detriment of the inhabitants and public institutions of the complainant State. *Held*, that a demurrer to the bill will not be regarded as admitting the truth of the facts well pleaded, but shall be overruled with leave to the defendant to answer. *Kansas* v. *Colorado*, 22 Sup. Ct. Rep. 552.

The rule has heretofore been well settled that a demurrer to a bill in equity admits the truth of all material facts, properly pleaded. *Interstate Land Co.* v. *Maxwell, etc., Co.*, 139 U. S. 569; *Gage* v. *Bailey*, 115 Ill. 646. This rule was not followed in the principal case for the reason, as the court seems to imply, that certain facts stated in the bill, if admitted, would have defeated the relief sought. The court cites no authority to support this holding, but bases it entirely upon the ground that important questions are involved, and that the opposite ruling would result in hardship to the complainant. The decision may be accounted for upon the ground that equity pleading is somewhat more flexible than pleading at law. It is, undoubtedly, desirable that a case of so great importance should be tried upon its merits. However, this result could have been reached by sustaining the demurrer and allowing the complainant to amend his bill, — a course that would not have involved so radical a departure from the well-settled rules of pleading. See *Schneider* v. *Lizardi*, 9 Beav. 461, 468; I. DANIELL, CHAN. PRAC., 6th ed. 544.

PROCEDURE — REVERSIBLE ERROR — PREJUDICIAL REMARKS BY COURT. — The court, in overruling a motion for a continuance supported by affidavits of the defendant and his counsel, imputed to them perjury, and accused them of an attempt to bolster up their cause by securing false testimony. *Held*, that the remarks, being overheard by the jurors, constitute reversible error, though the jury had not at the time been empanelled. *Allen* v. *United States*, 115 Fed. Rep. 3 (C. C. A., Ninth Circ.).

The general rule is that a party who knows of any prejudice entertained by a juror and makes no challenge when the jury is empanelled, is deemed to have waived his right. *Lisle* v. *State*, 6 Mo. 426; and see *Fox* v. *Hazelton*, 10 Pick. (Mass.) 275, 278. It is well known that jurors attribute great weight to any remarks, bearing upon the facts, made by the court. And undoubtedly the remarks of the court in the principal case so prejudiced the jurors as to render them wholly unfit to serve, and constituted cause for challenge. Yet it is probable that a court after making such remarks would have overruled any objections to the jurors on the ground of bias so created. And while the defendant might have carried the case up regularly on exceptions to such ruling, yet it would seem only proper, where the trial court has been so obviously unfair, that it should be reproved and the defendant fairly dealt with by the grant of a new trial. The cases are to this effect. *Bowman* v. *State*, 19 Neb. 523; *Peeples* v. *State*, 103 Ga. 629.

PROPERTY — COVENANT NOT TO ASSIGN LEASE WITHOUT CONSENT OF LESSOR — EFFECT OF MORTGAGE BY LESSEE. — A lease contained a covenant against assignment without the lessor's consent, with a condition for re-entry in case of breach. The lessee, without such consent, mortgaged the lease as security for a debt. Under Michigan law a mortgage has the effect of a lien. *Held*, that the condition is not violated. *Crouse* v. *Michell*, 90 N. W. Rep. 32 (Mich.).

The well-known hostility of the courts towards conditions imposing forfeiture leads to a uniformly strict construction of all such covenants. Thus the particular covenant against assignments is held not to include involuntary transfers. *Farnum* v. *Hefner*, 79 Cal. 575. Similarly it is held not to be violated by an agreement to assign, or by a bond for conveyance, or by an equitable mortgage. *Bristol* v. *Westcott*, 12 Ch. D. 461; *Mayhew* v. *Hardesty*, 8 Md. 479; *Doe d. Pitt* v. *Hogg*, 4 D. & R. 226. A like result has been reached in other cases where for various reasons the lessee's acts have failed to pass his entire legal interest. See *Croft* v. *Lumley*, 6 H. L. Cas. 672; *Doe d. Lloyd* v. *Powell*, 5 B. & C. 308. The effect of the decisions is thus to limit the scope of the covenants to direct voluntary assignments of the legal estate. The principal

case harmonizes with this distinction and reaches a correct result. The same view has been adopted in New York where the lien theory of mortgages is accepted. See *Riggs* v. *Pursell*, 66 N. Y. 193. On the other hand, under the common law view of mortgages, the transfer would seem necessarily to be construed as a violation of the covenant; and such was, in fact, the decision in *Becker* v. *Werner*, 98 Pa. St. 555.

PROPERTY — PLEDGE OF MEMBERSHIP IN A STOCK EXCHANGE. — The defendant's intestate pledged his membership in the stock exchange to the plaintiff, as collateral security for a note. The seat was transferable only to some one who had been elected to the exchange. After the death of the intestate, the seat was sold, and the plaintiff claimed a lien on the proceeds of the sale. *Held*, that the plaintiff can recover, since the seat is property and can be pledged. *Nashua Sav. Bank* v. *Abbot*, 63 N. E. Rep. 1058 (Mass.)

The case is in accord with the great weight of authority. *Hyde* v. *Woods*, 94 U. S. 523; *Londheim* v. *White*, 67 How. Pr. 467; *Fish* v. *Fiske*, 154 Mass. 302; *Habenicht* v. *Lissak*, 78 Cal. 351. In Pennsylvania, however, garnishee process against the members of the exchange was denied, and the court declared that a seat on an exchange was not property subject to execution in any form. *Pancoast* v. *Gowen*, 93 Pa. St. 66. The Supreme Court of Illinois has adopted the same view, reiterating that such membership is merely a personal privilege, or license to buy and sell on the floor of the exchange. *Barclay* v. *Smith*, 107 Ill. 349. The ground of these latter decisions seems to be that the owner has not an absolute power to dispose of the seat. The rule of the principal case is clearly much to be preferred. True, the owner's power of disposal is qualified; but it is hard to see why that should be decisive. The seat is a valuable asset, and should not be withheld from the owner's creditors by mere force of a narrow and inadequate definition of property.

TAXATION — EXEMPTIONS — LEASED PARSONAGE. — A parsonage was rented to an outsider and the income derived therefrom was appropriated to the salary of the pastor, who for his own convenience had rented a residence in another locality. *Held*, that under the provisions of the Constitution of South Carolina, art. 10, § 4, relating to exemptions, the parsonage was not liable to taxation. *Protestant Episcopal Church, etc*, v. *Priolean County Auditor*, 40 S. E. Rep. 1026 (S. C.).

Under the varied legislative provisions exempting from taxation the property of religious, educational, and charitable institutions, a proper and almost uniform result has been attained by the courts in holding that the property of such institutions shall cease to be exempt when it is occupied for purposes other than those directly connected with their objects and work, and that property used for revenue solely is subject to be taxed. *President, etc., of Harvard College* v. *Assessors of Cambridge*, 175 Mass. 145; see 19 L. R. A. 289. In the principal case the court reached an opposite result by holding, first, that the constitution does not except from exemption a parsonage used otherwise than as a pastor's home; and, secondly, that the property, though rented, was nevertheless a parsonage within the meaning of the exemption clause. Whether or not one can agree with the court, on the second point, it seems evident from an examination of the constitution, that the intention there manifest, that a parsonage shall not be exempt when it ceases to be used as a parsonage, finds sufficient expression in the rather obscure language employed.

TORTS — DUTY OF LANDLORD TO NOTIFY TENANT OF HIDDEN DANGERS IN LEASED PREMISES. — The tenant was injured by the fall of a chimney, carelessly left by the landlord in a dangerous condition, the danger being known to the landlord and neither patent nor known to the tenant. *Held*, that since the lease contains no express or implied promise that the premises are safe, the tenant cannot recover. *Land* v. *Fitzgerald*, 52 Atl. Rep. 229 (N. J.).

A landlord knew of the presence of sewer gas in the leased premises. He failed to disclose the fact to the tenant, and the latter, being ignorant of it, was injured by the gas. *Held*, that the landlord is bound to notify the tenant of hidden dangers of whose existence he knows. *Sunasack* v. *Morey*, 196 Ill. 569.

A third view of the legal status of the tenant in cases of this kind is adopted by the Supreme Court of Tennessee, which gives him the rights of one on the premises by invitation, imposing on the landlord the duty of making reasonable examination to discover hidden defects. *Hines* v. *Willcox*, 96 Tenn. 148. The rule adopted by the Illinois court making his rights similar to those of one on premises by the license of the owner, seems to be supported by the weight of authority. *Cowen* v. *Sunderland*, 145 Mass. 363; *Cesar* v. *Karutz*, 60 N. Y. 229. This view appears the more reasonable. The fact that the prospective tenant is, from his situation, thrown on his guard, and that he may protect himself by the terms of his lease, may properly put on him

the burden of the examination, for defects not known to the landlord. But when the landlord is aware of hidden dangers, the fair rule is to require him to inform the tenant. The New Jersey Court treats the action as if founded on an implied promise instead of tort. The two authorities cited in the case do not justify the decision, for in both the tenant himself had actual knowledge of the danger. *Clyne* v. *Helmes*, 61 N. J. Law 358; *Mullen* v. *Rainear*, 45 N. J. Law 520.

TORTS — LIBEL — PRIVILEGE DEPENDENT UPON USE OF DUE CARE. — The defendant, a mercantile agency, received a report from an agent, that the plaintiff had made an assignment to secure the assignee for indorsing a note. The agency, in a notice sent to its subscribers, stated that the plaintiff had made an assignment for the benefit of his creditors. *Held*, that the continuance of the privilege arising from the occasion is dependent upon the exercise of due care in forwarding the information. *Douglass* v. *Daisley*, 114 Fed. Rep. 628 (C. C. A., First Circ.).

It is generally assumed that a conditional privilege may be rebutted only by proof of actual malice. *Clark* v. *Molyneux*, 47 L. J. Rep. C. L. 230; POLLOCK, TORTS, 6th ed., 260, 268. In practice this view is favorable to the defendant, as it is difficult to prove the existence of malice. To offset this advantage on the part of the defendant, it has been held in some American jurisdictions, that absence of reasonable cause for belief in the truth of the publication will destroy the privilege. *Carpenter* v. *Bailey*, 53 N. H. 590; *Express, etc., Co.* v. *Copeland*, 64 Tex. 354. The holding in the principal case seems to be in accord with this rule, reasonable ground for belief being dependent upon the exercise of reasonable care in ascertaining the truth of the subject matter of the publication. See *Toothaker* v. *Conant*, 91 Me. 438. The decision finds support in the closely analogous cases dealing with reports of judicial proceedings, which are privileged if fair and honest. *Usill* v. *Hales*, 3 C. P. D. 319. It seems reasonable that the right arising from a privileged occasion should be lost if carelessly or unreasonably exercised. On principle, therefore, the decision appears correct.

TORTS — MALICIOUS PROCUREMENT OF EMPLOYEE'S DISCHARGE. — The defendants, who were officers in labor unions, combined to prevent the plaintiffs, who were members of a rival organization, and who were employed from day to day, from being employed upon any building upon which the defendants' men were working, and in several instances procured the plaintiffs' discharge by threat of a strike. *Held*, that the defendants could not be enjoined from so doing. *Nat. Protective Ass'n, etc., et al.* v. *Cumming et al.*, 170 N. Y. 315.

The appellant corporation, on account of the appellee's refusal to compromise a claim against it, procured his discharge by threatening to cancel a policy held by his employer in the appellant corporation. *Held*, that the appellee could recover the damages suffered by reason of his discharge. *London Guarantee, etc., Co.* v *Horn*, 101 Ill. App. 355. For a discussion of the questions involved, see 15 HARV. L. REV. 402; 8 HARV. L. REV. 1.

TORTS — MALICIOUS PROSECUTION OF CIVIL SUIT. — *Held*, that an action will lie for the malicious prosecution of a civil suit where there has been no arrest of the person nor seizure of property. *Wade* v. *National Bank, etc., of Tacoma*, 114 Fed. Rep. 373 (Circ. Ct., Wash.). For a discussion of the question involved, see 12 HARV. L. REV. 358.

TRUSTS — DISTRIBUTION BETWEEN LIFE TENANT AND REMAINDERMAN. — A corporation whose shares were held in trust, instead of declaring dividends laid by its earnings in the form of a surplus. The trustee sold the stock. *Held*, that the increase in price due to earnings made by the corporation during the life tenancy is income and goes to the life tenant. *Simpson* v. *Millsaps*, 31 So. Rep. 912 (Miss.). See NOTES p. 54.